DATE: JULY 2, 1997
CASE NO. 95-INA-426

In the Matter of:

FERREIRA RODRIGUES CONSTRUCTION
Employer

On Behalf of:

RENATO DA SILVA MARTINS
Alien

APPEARANCE: Dale Tarzia, Esq.
For the Employer

Before: Holmes, Huddleston, and Neusner
Administrative Law Judges

JOHN C. HOLMES
Administrative Law Judge

DECISION AND ORDER

This case arose from the Employer's request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of an application for labor certification. The certification of aliens for permanent employment is governed by Section 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. §1182(a)(5)(A)(the "Act"), and the regulations promulgated thereunder, 20 C.F.R. Part 656.

Under §212(a)(5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and (2) the employment of the alien will not adversely affect the wages and working conditions of Unite States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in the Appeal File ("AF"), and any written arguments of the parties. 20 C.F.R. §656.27(c).

Statement of the Case

On November 30, 1992, the Employer, Ferreira Rodrigues Construction, filed an application for labor certification to enable the Alien, Renato da Silva Martins, to fill the position of Carpenter. The job duties for the position, as stated on the application, are as follows:

> Construct, erect, install and repair structures and fixtures of wood, plywood, wallboard and decorative paneling of residential and commercial buildings using hand and power tools; study blue prints and building plans for type of material required; order materials; prepare layout; cut and shape materials; inspect prior to installation; erect and install completed structures and fixtures.

(AF 15).

The stated job requirement for the position are: four years of high school education; and, two years of experience in the job offered (AF 15).

In a Notice of Findings ("NOF") issued on September 26, 1994, the CO proposed to deny certification on the grounds, inter alia, that the Employer had failed to establish that it was offering "employment" as defined in 20 C.F.R. §656.3 (formerly §656.50), or that, indeed, it is an "employer" within the meaning of that regulation. The CO stated, in pertinent part:

> Pursuant to 20 CFR 656.50 DEFINITIONS, "employment" means permanent full-time work by an employee for an employer other than oneself.
>
> Pursuant to 20 CFR 656.50 DEFINITIONS, "employer" means a person, association, firm, or a corporation which currently has a location within the United States to which U.S. workers may be referred for employment.
>
> The New Jersey State Office advises that the telephone number listed on 750A form was disconnected during the recruitment period of 5-6-93 to 6-10-93, and that the State Office personnel attempted to refer ten (10) US applicants, but were unable to refer since employer's phone was inoperative.
>
> State Office also advises that they made several telephone calls to the attorney, Mr. Liu, who assured the State Office representative that the employer would be available to interview, however, employer was not available, and the State Office was unable to refer qualified applicants.
>
> Employer should clarify all of the above, and document the number of years he is in business; the unemployment number of the business; the total number of

> workers and the number of carpenters that employer had on staff in each of the last 3 years; the number of months each carpenter worked in each of the last 3 years; submit copies of telephone bills for April, May and June,, 1993, copy of income tax return for 1992 and 1993, and copies of contracts for carpentry work to support the facts.

(AF 84).

The Employer submitted its rebuttal on or about December 9, 1994 (AF 74-75). The Employer asserted that the telephone number listed on the application "has never been disconnected." Furthermore, Employer stated that it has been in business since 1987. Employer's documentation included some invoices, including one during the month of May 1993, contracts for carpentry, the Employyer's 1993 tax returns, and some 1099 forms. However, in its rebuttal, the Employer also acknowledged the following:

> We do not have an unemployment number of the business, since we issue Forms 1099 to subcontractors, copies of which are enclosed in lieu of payroll records, which we do not have. Enclosed are copies of Forms 1099 for substantial amounts of compensation for 1992...the enclosed documentation establishes the existence of the employer. It is requested that we document the total number of workers and number of carpenters which we had on staff in each of the last 3 years. As stated above, we subcontract our work to independent contractors, as evidenced by the Forms 1099. Therefore, technically, we lack workers and carpenter "on staff." At any given time, however, we may work with subcontractors of 5-15 individuals on a regular basis.

(AF 148-149).

The CO found the rebuttal unpersuasive and issued a Final Determination on December 16, 1994, denying certification (AF 152-155).

On or about January 20, 1995, the Employer filed a "Request for Review and Reconsideration" of the denial of certification (AF 86-151). The CO denied the Request for Reconsideration on March 14, 1995 (AF 177), and subsequently forwarded this matter to the Board of Alien Labor Certification Appeals for review.

Discussion

In the Final Determination, the CO cited the concessions made by the Employer regarding the absence of any workers and carpenters on staff, and the submission of 1099 forms rather than W-2 forms. Furthermore, the CO noted the absence of an unemployment number, and the fact that Employer's 1993 tax returns fail to list any salaries or wages paid. Furthermore, the CO stated that Employer failed to adequately document its assertion that its telephone was operative during the recruitment period. For all of the foregoing reasons, the CO determined that the Employer "fails to document that it is an 'employer' offering full-time 'employment' under the

definitions listed above." (AF 153-154). We agree.

Even assuming that the Employer had documented that its telephone was operative during the recruitment period, there is little, if any, documentation to establish that permanent full-time work is available. To the contrary, the Employer's own rebuttal statements clearly indicate that it subcontracts its work to independent contractors on an as needed basis. Thus, the evidence fails to establish that the Employer offers full-time, permanent, salaried employment. Sheldon Smith Aviation, 91-INA-90 (June 1, 1993).

In its request for reconsideration, the Employer submitted telephone bills in an attempt to document that the its telephone was not disconnected during the recruitment period. A file notation suggests that the CO considered such evidence prior to denying the reconsideration request (AF 177-178). The Employer's reconsideration documentation, however, raises more questions that it resolves. First, as noted by the CO, the telephone bill is in the name of "A S Silva," who is not the Employer herein (AF 167-173,178). Furthermore, we find it curious that the Alien apparently worked for "Alfredo Silva Construction" in 1987 (AF 7). Moreover, we note that the telephone bills in question contain a Newark, New Jersey address. While the Alien resides in Newark (at a different address), the Employer is based in Elizabeth, New Jersey (AF 24).

Finally, even if the Employer had ready explanations for all these questions, and the telephone bills clearly documented that the Employer's telephone was not disconnected during the recruitment period, for the reasons stated above, we would still adopt the CO's determination that the Employer failed to document the availability of "employment" as defined above. Therefore, we find that labor certification was properly denied.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

For the Panel:

JOHN C. HOLMES
Administrative Law Judge